FILED

No. 97 836 NOV 19 1997

OFFICE OF THE CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1997

STATE OF NORTH CAROLINA,

Petitioner,

v.

FEDERAL ENERGY REGULATORY COMMISSION,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

Of Counsel:

MICHAEL F. EASLEY
Attorney General of the State of North Carolina
ALAN S. HIRSCH
Special Deputy Attorney General
MARC D. BERNSTEIN
Associate Attorney General
NORTH CAROLINA DEPARTMENT OF JUSTICE
P.O. Box 629
Raleigh, NC 27602
(919) 716-6000

BERNARD NASH
(*Counsel of Record*)
FREDERICK M. LOWTHER
BETH L. WEBB
DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

Attorneys for Petitioner State of North Carolina

November 19, 1997

PRESS OF BYRON S. ADAMS ♦ WASHINGTON, D.C. ♦ 1-800-347-8208

QUESTION PRESENTED

Section 401(a)(1) of the Clean Water Act requires a State water quality certification as a condition precedent to a federal license authorizing an activity that may result in a discharge into that State's waters.

Is a license amendment authorizing an activity that alters an existing discharge, by reducing the flow of water over a hydroelectric dam, excused from such State certification requirement merely because the alteration does not involve the addition of a substance to the water?

LIST OF PARTIES AND *AMICI*

PETITIONERS:

State of North Carolina
Roanoke River Basin Association

RESPONDENT:

Federal Energy Regulatory Commission

INTERVENOR:

City of Virginia Beach, Virginia

***AMICI*:**

The United States

Alabama, Alaska, Arizona, Arkansas, California, Connecticut, Delaware, Florida, Hawaii, Idaho, Illinois, Indiana, Iowa, Kansas, Kentucky, Louisiana, Maine, Maryland, Massachusetts, Michigan, Minnesota, Mississippi, Missouri, Montana, Nevada, New Hampshire, New Mexico, New York, North Dakota, Ohio, Oklahoma, Pennsylvania, Rhode Island, South Dakota, Texas, Utah, Vermont, Washington, West Virginia, and Wyoming (in support of Petitioner North Carolina)

Virginia (in support of Respondent Federal Energy Regulatory Commission)

American Public Power Association
Edison Electric Institute
National Hydropower Association

TABLE OF CONTENTS

Page

QUESTION PRESENTED i

LIST OF PARTIES AND *AMICI* ii

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

STATEMENT OF JURISDICTION 2

STATUTORY PROVISIONS INVOLVED 2

STATEMENT OF THE CASE 3

Procedural History 3

Section 401(a)(1) and the Clean Water Act 5

The Court of Appeals Decision 7

a. The majority decision 7

b. The dissent 9

THE WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT 12

CONCLUSION 17

APPENDIX

North Carolina v. FERC, 112 F.3d 1175 (D.C. Cir. 1997) 1a

Judgment (D.C. Cir. May 9, 1997) 47a

Page

Remand Of The Record (D.C. Cir. Sept. 11, 1996) 49a

Order Amending Remand Of The Record (D.C. Cir. Sept. 19, 1996) 53a

Virginia Electric & Power Co., Project No. 2009-003, 72 FERC ¶ 61,075 (1995) 55a

Virginia Electric & Power Co., Project No. 2009-008, 72 FERC ¶ 61,283 (1995) 88a

Virginia Electric & Power Co., Project No. 2009-010, 77 FERC ¶ 61,138 (1996) 107a

Order Denying Petitions For Rehearing (D.C. Cir. Aug. 21, 1997) 130a

Order Denying Suggestions For Rehearing *In Banc* (D.C. Cir. Aug. 21, 1997) 132a

16 U.S.C. § 797(e) 134a

33 U.S.C. § 1251 ..... 136a

33 U.S.C. § 1311 ..... 140a

33 U.S.C. § 1312 ..... 164a

33 U.S.C. § 1313 ..... 166a

33 U.S.C. § 1316 ..... 175a

33 U.S.C. § 1317 ..... 179a

33 U.S.C. § 1341 ..... 185a

33 U.S.C. § 1362 ..... 190a

18 C.F.R. § 4.38(f) 194a

Page

Amici Briefs

Brief of *Amici Curiae* States (Dec. 9, 1996) 197a

Addendum to Brief of *Amici Curiae* States (Jan. 8, 1997) 224a

Amici Curiae Brief in Support of Suggestion of State of North Carolina for Rehearing *In Banc* of States (June 23, 1997) 229a

TABLE OF AUTHORITIES

Page

Cases:

American Rivers, Inc. v. FERC, Nos. 1169, 1170, 1171, 1172, Dockets 96-4110L, 96-4112CON, 96-4116CON, 96-4118CON, 1997 WL 691043 (2d Cir. Nov. 5, 1997) 7, 13, 17

City of Fredericksburg, Va. v. FERC, 876 F.2d 1109 (4th Cir. 1989) 17

District of Columbia v. Schramm, 631 F.2d 854 (D.C. Cir. 1980) 7

Keating v. FERC, 927 F.2d 616 (D.C. Cir. 1991) 7, 13

PUD No. 1 of Jefferson County v. Washington Dep't of Ecology, 511 U.S. 700 (1994) 7, 14, 15, 16

Roosevelt Campobello Int'l Park Comm'n v. United States EPA, 684 F.2d 1041 (1st Cir. 1982) 7

Administrative Orders:

Virginia Electric & Power Co., Project No. 2009-003, 72 FERC ¶ 61,075 (1995) 2, 4

Virginia Electric & Power Co., Project No. 2009-008, 72 FERC ¶ 61,283 (1995) 2, 4

Page

Virginia Electric & Power Co., Project No. 2009-010, 77 FERC ¶ 61,138 (1996) 2, 5

Statutes:

16 U.S.C. § 797(e) 3

16 U.S.C. § 825*l*(b) 5

28 U.S.C. § 1254(1) 2

33 U.S.C. § 1251(b) 5

33 U.S.C. § 1311 3

33 U.S.C. § 1312 3

33 U.S.C. § 1313 3

33 U.S.C. § 1316 3

33 U.S.C. § 1317 3

33 U.S.C. § 1341 ..... 3, 13

33 U.S.C. § 1341(a)(1) ..... *passim*

33 U.S.C. § 1341(a)(3) 17

33 U.S.C. § 1341(d) 7

33 U.S.C. § 1362(6) 3, 6

33 U.S.C. § 1362(12) 3, 6

33 U.S.C. § 1362(16) 3, 5

33 U.S.C. § 1362(19) 3, 6

Page

Regulations:

18 C.F.R. § 4.38(f)(7)(iii) 4

Supreme Court Rules:

Rule 13 2

In The
SUPREME COURT OF THE UNITED STATES
October Term, 1997

No. 97-

State of North Carolina,

Petitioner,

v.

Federal Energy Regulatory Commission,

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

---

PETITION FOR A WRIT OF CERTIORARI

The State of North Carolina petitions for a writ of certiorari to review the May 9, 1997 decision of the United States Court of Appeals for the District of Columbia Circuit holding that the State water quality certification requirement of Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1) ("Section 401(a)(1)"), applies only to activities that would add a substance to the State's waters, and not to activities that would otherwise affect those waters by altering an existing discharge.

OPINIONS BELOW

The opinion of the Court of Appeals, published on May 9, 1997 and reported at 112 F.3d 1175, together with the Court's judgment entered the same day, is reproduced in the Appendix at 1a-48a. The Court's prior orders remanding the

case to the Federal Energy Regulatory Commission ("FERC"), dated September 11, 1996 and September 19, 1996, are reproduced at 49a-54a. The Court's August 21, 1997 orders denying the petitions for rehearing and the Suggestions for Rehearing *In Banc* are reproduced at 130a-133a. The FERC orders under review are reported at *Virginia Electric & Power Co., Project No. 2009-003*, 72 FERC ¶ 61,075 (1995); *Virginia Electric & Power Co., Project No. 2009-008*, 72 FERC ¶ 61,283 (1995); and *Virginia Electric & Power Co., Project No. 2009-010*, 77 FERC ¶ 61,138 (1996), and are reproduced at 55a-129a.

STATEMENT OF JURISDICTION

This Court's jurisdiction to review the May 9, 1997 decision of the Court of Appeals is invoked pursuant to 28 U.S.C. § 1254(1). This Petition is filed within 90 days of the Court's August 21, 1997 orders denying rehearing as required by Supreme Court Rule 13.

STATUTORY PROVISIONS INVOLVED

Section 401(a)(1) of the Clean Water Act, 33 U.S.C. § 1341(a)(1), provides, in pertinent part, that

> Any applicant for a Federal license or permit to conduct any activity including, but not limited to, the construction or operation of facilities, which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate . . . that any such discharge will comply with [*inter alia*, State water quality standards promulgated under 33 U.S.C. § 1313]. . . . No license or permit shall be granted until the certification required by this section has been obtained or has been waived . . . . No license or

> permit shall be granted if certification has been denied by the State . . . .

Section 401 (33 U.S.C. § 1341), and the other sections of the Clean Water Act referred to therein (*viz.*, 33 U.S.C. §§ 1311, 1312, 1313, 1316 and 1317), are reproduced in full in the Appendix at 140a-189a.

The statutory definitions of the terms "discharge," "discharge of a pollutant" and "discharge of pollutants," "pollutant" and "pollution" (33 U.S.C. §§ 1362(16), (12), (6) and (19)) are reproduced in full in the Appendix at 190a-193a.

STATEMENT OF THE CASE

Procedural History

Petitioner, the State of North Carolina, challenges two orders of FERC that amend an existing hydroelectric project license. The license is held by Virginia Electric and Power Company ("VEPCO") and authorizes the operation of the Roanoke Rapids and Gaston Hydropower Project (the "Hydro Project"), located on the Roanoke River.[1] The Hydro Project dam creates a large body of water, Lake Gaston, which is located primarily in North Carolina and partly in Virginia. The dam and power generating station are located entirely within North Carolina. The water discharging over the dam and through the turbines into the Roanoke River is agreed by all parties, including FERC, to be a "discharge" that "originates" in North Carolina, as those terms are used in Section 401(a)(1) of the Clean Water Act.

The FERC license amendment permits the City of Virginia Beach, Virginia to build an intake structure 300 yards

---

[1] The license was originally issued to VEPCO by the Federal Power Commission, FERC's predecessor agency, pursuant to Section 4(e) of the Federal Power Act (16 U.S.C. § 797(e) (134a-135a)) on January 24, 1951, as amended on March 25, 1960 (23 FPC 537 (1960)), for a term of 50 years (10 FPC 1 (1951)), and expires on January 31, 2001.

north of the North Carolina border in a small tributary of Lake Gaston (in Virginia); reverse the tributary's flow; draw up to 60 million gallons of water per day ("mgd") upstream from the main body of the lake (in North Carolina); and transport the water across two river basins through a 76-mile pipeline and various municipal systems for use mainly in Virginia Beach, Virginia (the "Pipeline Project"). The water withdrawn will equal almost ten percent of the river's flow during periods of low flow, when water quality is at greatest risk. Thus, there will be a major alteration in the discharge from the Hydro Project in North Carolina.

VEPCO did not seek or obtain a Section 401(a)(1) certification from North Carolina that the altered discharge would comply with its water quality standards. FERC nonetheless issued the license amendment, over North Carolina's objection. FERC acknowledged that the discharge at the dam would be altered, but held that the Pipeline Project itself did not result in a "discharge" in North Carolina because it did not add any substance to the water flowing over the dam. FERC therefore held that the certification requirement of Section 401(a)(1) did not apply.[2]

---

[2] FERC initially rendered a decision which "assum[ed], *arguendo*" that the amendment was subject to Section 401(a)(1), but held that North Carolina's Section 401(a)(1) rights were nullified by a FERC regulation (18 C.F.R. § 4.38(f)(7)(iii) (194a-196a)) limiting State certification rights to circumstances where FERC finds a "material adverse impact" on water quality in the discharge. *Virginia Elec. & Power Co., Project No. 2009-003*, 72 FERC ¶ 61,075, at 61,393-94 (67a-68a) (1995), *reh'g denied*, *Virginia Elec. & Power Co., Project No. 2009-008*, 72 FERC ¶ 61,283 (1995). After briefing and oral argument, the panel hearing the case remanded it to FERC for determination whether the license amendment was in fact subject to Section 401(a)(1). On remand, FERC found that the amendment was not subject to Section 401(a)(1) because the alteration in the discharge did not

(Footnote continued)

North Carolina petitioned for review of the FERC decision.[3] Forty States filed briefs *amici curiae* in support of North Carolina's argument that FERC had no authority to issue the license amendment without a Section 401(a)(1) certification from North Carolina.[4] The Court of Appeals affirmed over a dissent by Circuit Judge Wald, and rehearing was denied.

Section 401(a)(1) and the Clean Water Act

Congress' fundamental purpose in enacting the Clean Water Act was to "recognize, preserve, and protect the primary responsibilities and rights of States to prevent, reduce, and eliminate pollution, [and] to plan the development and use . . . of land and water resources." 33 U.S.C. § 1251(b) (137a). Section 401(a)(1) of the Act requires that "[a]ny applicant for a Federal license or permit to conduct any activity . . . which may result in any discharge into the navigable waters, shall provide the licensing or permitting agency a certification from the State in which the discharge originates or will originate" stating that the discharge "will comply with the applicable" Clean Water Act and State water quality standards.[5]

(Footnote continued)

involve the addition of a substance to the water. *Virginia Elec. & Power Co., Project No. 2009-010,* 77 FERC ¶ 61,138 (1996).

[3] North Carolina invoked the jurisdiction of the Court of Appeals pursuant to 16 U.S.C. § 825*l*(b), which states that any party aggrieved by a FERC order issued under the Federal Power Act may obtain a review.

[4] The States' briefs are reproduced in the Appendix at 197a-263a.

[5] "Discharge," its lesser included terms, "pollutant" and "pollution" are defined as follows:

> The term "discharge" when used without qualification includes a discharge of a pollutant, and a discharge of pollutants.

33 U.S.C. § 1362(16).

> The term "discharge of a pollutant" and the term

(Footnote continued)

This requirement of State certification is central to the Clean Water Act. Through Section 401(a)(1), Congress conferred upon the States -- not the federal government -- the primary authority and responsibility to protect the quality of the nation's waters:

> The states remain, under the Clean Water Act, the "prime bulwark in the effort to abate water pollution," and Congress expressly empowered them to impose and enforce water quality standards that are more stringent than those required by federal law. . . .
>
> One of the primary mechanisms through which the states may assert the broad authority reserved to them is the certification requirement set out in section 401 of the Act. . . . Through

---

(Footnote continued)

> "discharge of pollutants" each means (A) any addition of any pollutant to navigable waters from any point source, (B) any addition of any pollutant to the waters of the contiguous zone or the ocean from any point source other than a vessel or other floating craft.

33 U.S.C. § 1362(12).

> The term "pollutant" means dredged spoil, solid waste, incinerator residue, sewage, garbage, sewage sludge, munitions, chemical wastes, biological materials, radioactive materials, heat, wrecked or discarded equipment, rock, sand, cellar dirt and industrial, municipal, and agricultural waste discharged into water.

33 U.S.C. § 1362(6).

> The term "pollution" means the man-made or man-induced alteration of the chemical, physical, biological, and radiological integrity of water.

33 U.S.C. § 1362(19).

> this requirement, Congress intended that the states would retain the power to block, for environmental reasons, local water projects that might otherwise win federal approval.

Keating v. FERC, 927 F.2d 616, 622 (D.C. Cir. 1991) (citations omitted).

Short of blocking a water project, a State may also impose conditions that must be incorporated in the federal license or permit. Section 401(d), 33 U.S.C. § 1341(d); *PUD No. 1 of Jefferson County v. Washington Dep't of Ecology*, 511 U.S. 700, 707-08, 711-12 (1994); *American Rivers, Inc. v. FERC*, Nos. 1169, 1170, 1171, 1172, Dockets 96-4110L, 96-4112CON, 96-4116CON, 96-4118CON, 1997 WL 691043 (2d Cir. Nov. 5, 1997).[6] Thus, Section 401(a)(1) embodies a principle of federalism established by Congress *(see District of Columbia v. Schramm*, 631 F.2d 854, 863 (D.C. Cir. 1980)), and confers on the States authority which cannot lawfully be abrogated by a federal court or agency.

The Court of Appeals Decision

a. *The majority decision*

The panel majority assumed *arguendo* what the parties already agreed: that the flow of water through the Hydro Project turbines in North Carolina is a statutory "discharge." 112 F.3d at 1187 (16a). The majority nonetheless held that North Carolina had no Section 401(a)(1) rights with respect to the Hydro Project license amendment authorizing the Pipeline Project, because the Pipeline Project would not result in the "addition" of a "substance" to the water. *Id.* at 1187-89 (16a-20a).

---

[6] A State's exercise of its certification power is not reviewable by a federal court or agency; review lies only in the courts or agencies of the State. *E.g., American Rivers*, 1997 WL 691043, at *8; *Roosevelt Campobello Int'l Park Comm'n v. United States EPA*, 684 F.2d 1041, 1056 (1st Cir. 1982).

The majority's analysis relied upon the statutory definition of "discharge," which states that "'discharge' when used without qualification includes a discharge of a pollutant, and a discharge of pollutants." *Id.* at 1187 (17a). The court noted that these latter terms are defined by reference to the "addition" of a "pollutant." *Id.* The court then concluded that the general term "discharge" is limited by the definition's "statement of inclusion":

> [A]lthough the focus of the definitional section is on the regulation of pollutants rather than the general regulation of project discharges, the nearest evidence we have of definitional intent by Congress reflects, as might be expected, that the word "discharge" contemplates the addition, not the withdrawal, of a substance or substances.
>
> On the evidence of record, the operation of the Pipeline Project will not result in the "addition" of anything to the waters of Lake Gaston. . . . A decrease in the volume of water passing through the dam turbines cannot be considered a "discharge" . . . .

Id. at 1187-88 (17a-18a) (footnote omitted).

The court went on to conclude that alteration of a discharge that is "already in existence" cannot give rise to Section 401(a)(1) rights:

> Stating that operation of the Pipeline Project will "result in an altered discharge" is simply a way of saying in legalese that operation of the Pipeline Project will alter the discharge. However, the existence of certification rights under Section 401(a)(1) does not depend on whether a discharge is "altered." Section 401(a)(1) certification rights vest only if

> an activity "may result in" a discharge. . . . The word "alter" means to change something from its previous state, WEBSTER'S NEW INT'L DICTIONARY 63 (3rd ed.1961) ("to cause to become different"), implying that the thing changed was already in existence. By contrast, the word "result" implies causation. *See id.* at 1937 ("arise as a consequence"). Obviously, a subsequent event cannot be the cause of something that is already in existence.

Id. at 1188 (18a-19a).

b. *The dissent*

Circuit Judge Wald dissented, stating that the majority opinion "ignores the language, structure, and purpose of the Act, and wrests away from North Carolina the very power to make water quality judgments about its own waterways that Congress expressly meant for that State alone to have." 112 F.3d at 1195 (33a).

> The § 401 certification right is an essential component of the Act's state-oriented regulatory scheme. Obviously, how courts construe the Act's language specifying those situations in which States may wield this powerful weapon can critically affect their ability to protect the integrity of their waters in the way Congress intended. Too stingy an interpretation of § 401(a)(1) will severely burden each State's ability to implement the water quality program mandated by the Act, and will frustrate Congress' clear intent to institute a system under which States carry both the responsibility of setting their own water quality standards and a corresponding power to protect those standards

> from federally-licensed activities that threaten to undermine them.

Id. (citation omitted).

The dissent finds the majority's conclusion "paradoxical" in that

> it appears that North Carolina will wield a § 401(a)(1) certification right in 2001,[7] when the project's license will expire and VEPCO will request a new license. Yet the majority reaches the paradoxical conclusion that FERC may approve this license amendment, which all parties concede will alter the North Carolina "discharge," without requiring any certification from North Carolina. . . . Logically, if a State must consent before a new discharge is introduced into its waters, then a change in that discharge must require a new consent.

Id. at 1195-96 (34a-35a) (citation omitted).

The dissent describes the majority's holding as a "sweeping and arbitrary limitation on State certification rights" which "badly distorts the definitions section of the Act, and improperly usurps crucial judgments on water quality that Congress reserved for the States into which the discharges flow." *Id.* at 1196 (35a-36a). The dissent finds the majority's statutory analysis fundamentally flawed in

> its insistence that "near[er]" evidence of Congress' "definitional intent" as to what constitutes a discharge can be found by looking at the Act's definition of the phrase "discharge of a pollutant" than by relying on the Act's own

---

[7] All parties agree that VEPCO must obtain North Carolina's certification in order to obtain a new license in 2001, even if the new license does not authorize any change in the discharge.

> definition of the very term under discussion -- "discharge." The Act expressly states that the term "'discharge' when used without qualification *includes* a discharge of a pollutant, and a discharge of pollutants." 33 U.S.C. § 1362(16) (emphasis added). The only inference I can discern from this clear expression of nonexclusivity in the definition of "discharge" is that it was meant to encompass a wider array of interferences with the navigable waters than would qualify as "discharges of pollutants."

Id. at 1196-97 (36a-37a).

The dissent also finds the majority's "'substance-adding'" test to be fundamentally inconsistent with the structure of the Act and its regulation of "pollution":

> Section 304 of the Act "expressly recognizes that water 'pollution' may result from 'changes in the movement, flow, or circulation of any navigable waters . . . .'" *PUD No. 1*, 511 U.S. at 719-20, 114 S.Ct. at 1913 (quoting 33 U.S.C. § 1314(f)). . . .
>
> The majority's niggardly construction of the term "discharge" threatens a congressional policy permeating the general structure of the Act . . . . When a federally-licensed activity would "result in" a "discharge" into the State's waters, the decision whether that interference with the State's waters would be tolerated was to belong solely to the State in which that discharge originated, not to a federal agency or to a federal court. . . . Interferences with the integrity of a waterway need not take the archetypal form of sludge spewing from an outfall; other changes can be just as deadly to

> fish and other wildlife as are toxic chemicals. For example, alterations that cause the temperature of the water in a discharge to rise, or that rearrange the spatial distribution of oxygen, sediment, or minerals in the downstream water, could be catastrophic from the perspective of water quality. Yet the effect of this court's decision will be to bar States in which altered discharges originate from acting to protect their waters from such pernicious effects, whenever the alteration does not "add" any "substance or substances" to the water. I do not believe Congress intended to give this court's essentially *ad hoc* and inevitably inexpert judgments precedence over the expert judgments of the States' water quality authorities, in the making of such crucial determinations.

Id. at 1196-98 (36a-40a) (citation omitted) (footnote omitted).

THE WRIT SHOULD BE GRANTED BECAUSE THE COURT OF APPEALS HAS ERRONEOUSLY DECIDED AN IMPORTANT QUESTION OF FEDERAL LAW THAT HAS NOT BEEN, BUT SHOULD BE, DECIDED BY THIS COURT

Water resource policy and water quality management are among the most vital issues of our times. The Court of Appeals decision fundamentally alters the balance of power between the States and the federal government, contrary to an express Congressional determination that the States -- not the federal government -- have primary responsibility for ensuring the quality of water within their borders. Congress further determined that both State and federally licensed projects must meet the water quality standards adopted by the States, which Congress expressly authorized to be more stringent than federal

standards. Section 401 is the mechanism through which a State ensures that a federally licensed project meets that State's standards. *Keating*, 927 F.2d at 622.

This broad scope of State authority under Section 401 was reaffirmed by the Second Circuit only two weeks ago in *American Rivers*. *American Rivers* confirms that FERC may not "second-guess" or "substitute its own judgment for that of the certifying [State]." 1997 WL 691043, at *9. Acknowledging the "special expertise" of State certifying agencies, the Second Circuit admonished that FERC "does not possess a roving mandate to decide that substantive aspects" of State water quality judgments may be ignored. *Id.* at *9-*10.

The decision below subordinates the primacy of State water quality judgments to those of the federal government. If the decision is allowed to stand, States will be stripped of their ability to preserve water quality in one of the most critical areas of environmental concern, *i.e.*, regulation of the flow of water over hydroelectric project dams. Regulation of dams is critical to preservation of our nation's rivers because dams change the entire character of their host river systems. Changes to the character of downstream flows (whether changes in quantity, temperature, timing, velocity or oxygen content) pose significant risks to water quality and thus to all environmental, recreational and industrial river uses.

There are more than one thousand hydroelectric dams in the United States, affecting untold numbers of rivers and tributaries. The exceptional importance of this issue of State authority, extending far beyond North Carolina, is shown by the fact that forty other States have supported North Carolina's assertion of Section 401(a)(1) rights in this case.

All parties agree that the water flowing over the Hydro Project dam and into the Roanoke River is a statutory "discharge" originating in North Carolina, and that the current characteristics of that discharge will require approval by North

Carolina when VEPCO's project is relicensed. The question of fundamental importance in this case is whether the preeminent statutory power of the States to protect water quality at the time of both licensing and relicensing of federal projects is suspended in the period between those two events. The Court of Appeals has held that it is, reaching the anomalous conclusion that the States' power to protect their water quality through certification continues only where the threat is from the "addition" of a "substance."

The decision is wrong, because it both misinterprets the statutory certification requirement and is fundamentally inconsistent with *PUD No. 1*. First, the Court of Appeals misreads the statutory language by improperly equating the two separately defined statutory terms "discharge" and "discharge of pollutants." The statute expressly negates any such equation by stating that "discharge" "*includes*" a "discharge of pollutants." By requiring that a "discharge" "add" a substance simply because "discharge of pollutants" requires an addition, the majority denies the general term "discharge" any meaning of its own.

Second, the decision below is inconsistent with this Court's recognition in *PUD No. 1* that a statutory "discharge" does not require the addition of any substance to water. *PUD No. 1* is predicated on the premise that "the discharge of water at the end of the tailrace after the water has been used to generate electricity" was a statutory "discharge" subject to State certification under Section 401(a)(1). 511 U.S. at 711. In stating this premise, this Court neither expressed nor implied, nor left room for FERC to impose, any requirement that a discharge must involve the "addition" of a "substance" to water.

More fundamentally, this Court explicitly pointed out that a reduction in water quantity has a water quality effect which is also subject to State control:

> [W]ater quantity is closely related to water quality; a sufficient lowering of the water quantity in a body of water could destroy all of its designated uses, ... [T]here is recognition in the Clean Water Act itself that reduced stream flow, *i.e.*, diminishment of water quantity, can constitute water pollution. First, the Act's definition of pollution as "the man-made or man induced alteration of the chemical, physical, biological, and radiological integrity of water" encompasses the effects of reduced water quantity. . . . Moreover, § 304 of the Act expressly recognizes that water "pollution" may result from "changes in the movement, flow, or circulation of any navigable waters . . ., including changes caused by the construction of dams."

Id. at 719-20 (citation omitted).

The majority's view that activities which result in "[a] decrease in the volume of water" cannot be subject to State certification (112 F.3d at 1188 (18a)) is inconsistent with this Court's recognition in *PUD No. 1* of the relationship between water quantity and water quality. A reduction in water quantity will increase the concentration of those substances that are already in an existing discharge or in the body of water into which the discharge flows.[8] This is scientifically and practically equivalent to adding substances to water. That is why States

---

[8] Although the instant case involves a single water withdrawal project, the majority's decision would permit FERC to authorize any number of additional withdrawals from the Hydro Project as well as any number of other withdrawals from other hydroelectric dams, without regard to the effect on water quality at and downstream of those dams. Host States would not have Section 401(a)(1) rights with respect to any of the related license amendments. It is that prospect that concerns North Carolina and the *amici* States as much as the direct impact of the Pipeline Project.

commonly impose minimum flow requirements as conditions to certification of hydroelectric projects, and why States are concerned about activities (such as withdrawals) that impact the quantity and flow of water. That is also why *PUD No. 1* expressly holds that a State may condition a Section 401(a)(1) certification for the discharge of water over a hydroelectric project dam on the maintenance of State-specified minimum flows.

The majority's conclusion is further undermined by the statutory definition of "pollutant," which recognizes that pollutants need not be "substances," and therefore that even a "discharge of a pollutant" need not result in the addition of a "substance" to the water. For example, "heat" -- which is a condition, not a substance -- is defined as a "pollutant," because, as Judge Wald noted (112 F.3d at 1198 (39a-40a)), raising the temperature of water can have the same deleterious effects on water quality as the deposit of a harmful substance.

The majority's notion that an "altered discharge" cannot trigger the certification requirement because a discharge "is already in existence" (*id.* at 1188 (18a-19a)) is belied by the statutory language. Section 401(a)(1) refers to "any discharge" that "originates ***or will originate.***" While a discharge that "will originate" clearly refers to a new discharge, a discharge that "originates" in the State at the time of certification is equally clearly a discharge that is already "in existence." Congress' use of the phrase "***any*** discharge" further supports the conclusion that altered discharges, as well as "new" discharges, are subject to Section 401(a)(1) certification. Clearly, an "altered discharge" may "result" from a newly authorized activity. As both the Court of Appeals and FERC have recognized, that is exactly what has happened in this case: new activities

authorized by the license amendment will result in an altered discharge.[9]

The majority's failure to recognize that Section 401(a)(1) applies to altered discharges places its decision squarely in conflict with the result in *City of Fredericksburg, Va. v. FERC*, 876 F.2d 1109 (4th Cir. 1989). That case involved the construction of a powerhouse project at an existing dam. The powerhouse project (which included authorization to withdraw 1 mgd from the impoundment) would alter the flow of water over the dam. That alteration triggered a requirement of certification under Section 401(a)(1) by the Commonwealth of Virginia. Because a FERC license was issued in the absence of such a certification, the Fourth Circuit reversed. Under the majority's decision here, Virginia's certification would not have been required because the discharge at the dam was "preexisting" and the powerhouse project would not "add" a "substance" to the water.

CONCLUSION

The Court of Appeals has decided an important question of federal law presenting an issue of critical importance to management of this country's water resources in a manner inconsistent with controlling precedent. If allowed to stand,

[9] As the Second Circuit just held, the Clean Water Act explicitly recognizes that even after a discharge is reviewed and certified, a certifying State has an interest which must be protected if the circumstances surrounding the discharge change. *American Rivers*, 1997 WL 691043. Similarly, Section 401(a)(3) of the Act permits a State that has issued a Section 401(a)(1) certification for a federal construction permit nonetheless to block a federal operating permit for the same discharge by revoking its certification on the grounds that, *inter alia*, there are changes in the operation of the facility or in the characteristics of the waters into which the discharge is made. In contrast, the majority decision renders a State powerless to deal with fundamentally changed circumstances that directly affect the quality of the water in and downstream of the discharge.

the decision will fundamentally alter the Congressionally mandated balance of power between the federal and State governments, and thereby seriously jeopardize the ability of the States to ensure the quality of the nation's waters. For these reasons, the petition for a writ of certiorari should be granted.

November 19, 1997

Respectfully submitted,

Of Counsel:

Michael F. Easley
Attorney General of the State of North Carolina
Alan S. Hirsch
Special Deputy Attorney General
Marc D. Bernstein
Associate Attorney General
NORTH CAROLINA DEPARTMENT OF JUSTICE
P.O. Box 629
Raleigh, NC 27602
(919) 716-6000

Bernard Nash
(Counsel of Record)
Frederick M. Lowther
Beth L. Webb
DICKSTEIN SHAPIRO MORIN & OSHINSKY LLP
2101 L Street, N.W.
Washington, D.C. 20037
(202) 785-9700

Attorneys for Petitioner State of North Carolina